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"The Crisis in Fair Use and the Potential of a 'Best Practices' Approach."

These days, the venerable fair use doctrine seems to be falling out of favour not only with its natural enemies, but with its traditional friends as well. More and more, the situational fact-specific nature of the doctrine is becoming a focus of criticism by some "public interest" advocates. Their claim, of course, is that as an affirmative defence of uncertain scope, the doctrine is too often less a source of security for users and more a plaything for lawyers. Otherwise expressed, the concern is that although fair use looks good on paper, it is of little real value in various domains of information practice.

Accepting that this critique has considerable force, and that the longer fair use rights go un- or under-exercised, the less vitality they will retain, the question is how to bring more certainty into the realm of fair use analysis, so as to encourage reliance on the doctrine. One possibility is new legislation specifying how the doctrine should apply in various disciplinary settings; it carries with it the risk of trading off some short term certain for a loss of flexibility in the longer term. Another is fair use "guidelines" negotiated between organizations representing owners, on the one hand, and various user communities, on the other; however, from the 1976 Act's Classroom Guidelines to the recent CONFU debacle, this approach has proved singularly ineffective in practice.

A further alternative that deserves exploration is the creation of statements of "best practices" agreed upon by and for the members of various academic and scholarly disciplines. Devised through discussions overseen by professional organizations and supported by competent legal device, such voluntary codes, embodying contextually appropriate interpretations of the scope of fair use, could serve several important functions. First, the existence of such consensus statements should operate to encourage individual practitioners and institutional gatekeepers (such as university counsel and academic publishers) to take reasonable risks in the interests of promoting the growth of knowledge. Second, "best practices" codes should, as a practical matter, serve to shield those who operate within them from exposure to suits for infringement. Third, in the unlikely event that such suits are brought, compliance with the relevant code will be significant proof tending to show the user's "good faith" - which is a perennially significant factor in judicial fair use analysis.